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8-28-2017

# Taylor v. Riley Respondent's Brief 2 Dckt. 43686

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IN THE SUPREME COURT OF THE STATE OF IDAHO

REED J. TAYLOR, an individual

Plaintiff-Appellant,

vs.

RICHARD A. RILEY, an individual;  
HAWLEY TROXELL ENNIS & HAWLEY,  
LLP, an Idaho limited liability partnership,

Defendants/Respondents,

and

SHARON CUMMINGS, Personal  
Representative of the Estate of Robert M.  
Turnbow; and EBERLE BERLIN KADING  
TURNBOW & MCKLVEEN, CHTD., an  
Idaho Corporation,

Defendants.

Supreme Court Docket No. 43686-2015

**RESPONDENTS' SUPPLEMENTAL BRIEF**

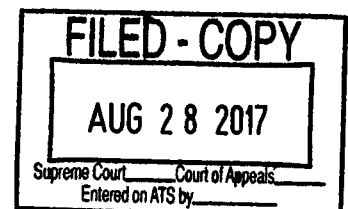
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Appeal from the District Court of the Fourth Judicial District of the State of Idaho,  
In and for the County of Ada, Honorable Richard D. Greenwood, District Judge, Presiding

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## **TABLE OF CONTENTS**

	<b>Page</b>
I. INTRODUCTION.....	1
II. RELEVANT PROCEDURAL HISTORY.....	2
III. SUPPLEMENTAL ISSUES ON APPEAL .....	3
IV. ARGUMENT.....	4
A. Timeliness of the Motion for Reconsideration is Jurisdictional. ....	4
B. Timeliness of the Motion for Reconsideration Can Be Raised Sua Sponte. ....	4
C. Effect on Appeal. ....	5
V. CONCLUSION.....	6
CERTIFICATE OF SERVICE .....	7

## **TABLE OF AUTHORITIES**

### **Cases**

<i>Baldwin v. Singer Sewing Machine Co.</i> , 48 Idaho 596, 598, 284 P. 1027, 1028 (1930).....	5
<i>Fairway Development Co. v. Bannock County</i> , 119 Idaho 121, 125-126, 804 P.2d 294, 298-299 (1990).....	4
<i>First Bank &amp; Trust of Idaho v. Parker Brothers, Inc.</i> , 112 Idaho 30, 32, 730 P.2d 950, 952 (1986).....	4
<i>Idaho State Ins. Fund v. Turner</i> , 130 Idaho 190, 191, 938 P.2d 1228, 1229 (1997).....	4
<i>King v. Seebeck</i> , 20 Idaho 223, 229, 118 P. 292, 293-294 (1911).....	5
<i>State v. Armstrong</i> , 146 Idaho 372, 374, 195 P.3d 731, 733 (Ct. App. 2008).....	4
<i>Wheeler v. MacIntyre</i> , 100 Idaho 286, 289, 596 P.2d 798, 801 (1979).....	4, 5

## **I. INTRODUCTION**

At oral argument on August 17, 2017, Justice Eismann, in response to Taylor's counsel's reference to a Declaration of Richard T. McDermott, stated that Taylor's Motion for Reconsideration was untimely filed, that the McDermott Declaration was submitted three (3) weeks too late and intimated that the McDermott Declaration might be excluded from the Appellate Record. Taylor's counsel requested permission to file a brief "on the issue of reconsideration". Permission was granted. Respondents were granted permission to file a responding supplemental brief.

The issue for which permission was granted to file a supplemental brief was timeliness of the Motion for Reconsideration and its effect on the appeal. Taylor was not granted permission to file supplemental briefing on what constitutes a final judgment. The majority of Appellant's Supplemental Brief focuses on the final judgment issue and should be stricken per the Motion to Strike filed contemporaneously herewith. Respondents' Supplemental Brief will be limited to addressing the timeliness of the Motion for Reconsideration and its effect on this appeal.

If the September 18, 2015 Eberle Berlin Judgment established the date when all Judgments became final, Plaintiff's Motion for Reconsideration was untimely and the District Court was deprived of jurisdiction to consider it. When motions and documents are not properly presented to the District Court, they are not properly part of the record on appeal. Consequently, the Motion for Reconsideration, McDermott Declaration and all other supporting declarations and documents should be excluded from consideration of the issues on appeal.

If, on the other hand, the October 9, 2015 Final Amended Judgments in favor of Riley and Hawley Troxell are the final judgments, Taylor's Motion for Reconsideration was timely filed and there should be no effect upon the Appellate Record or what can be considered in determining the actual issues on appeal.

## **II. RELEVANT PROCEDURAL HISTORY**

On July 8, 2015, an Amended Judgment was entered in favor of Hawley Troxell dismissing Plaintiff's Complaint against it with prejudice and awarding costs and attorney fees in the amount of \$25,029.00. (R., p. 5832.) The Amended Judgment does not have a Rule 54(b) Certificate attached. (*Id.*)

On July 8, 2015, an Amended Judgment was entered in favor of Riley dismissing Plaintiff's Complaint against him with prejudice and awarding costs and attorney fees in the amount of \$239,265.25. (R., p. 5830.) There is no Rule 54(b) Certificate attached. (*Id.*)

On September 18, 2015, a Judgment was entered dismissing with prejudice all claims against Defendants Sharon Cummings, Personal Representative of the Estate of Robert M. Turnbow, and Eberle Berlin Kading Turnbow & McKlveen, Chtd. ("Eberle Berlin Judgment") (R., p. 6313.) No Rule 54(b) Certificate was attached. (*Id.*)

On October 2, 2015, the fourteen (14) day deadline for filing a Motion for Reconsideration expired (assuming the September 18, 2015 Eberle Berlin Judgment is the date when all Judgments became final).

On October 9, 2015, a Final Amended Judgment was entered in favor of Hawley Troxell dismissing Plaintiff's Complaint against it with prejudice and awarding costs and attorney fees in the amount of \$25,029.00. (R., p. 6316.) It has a Rule 54(b) Certificate attached. (*Id.*)

On October 9, 2015, a Final Amended Judgment was entered in favor of Riley dismissing Plaintiff's Complaint against him with prejudice and awarding costs and attorney fees in the amount of \$239,265.25. (R., p. 6319.) It has a Rule 54(b) Certificate attached. (*Id.*)

On October 23, 2015, Plaintiff filed a Motion for Reconsideration of nearly every decision or order previously entered by the district court. (R., p. 6322.) On that same date, Taylor filed an Expert Witness Declaration of Richard T. McDermott. (R., p. 6355.) Taylor also filed other declarations and supporting information. (R., pp. 6344, 6350.)

On October 29, 2015, Taylor filed his Notice of Appeal, appealing from the October 9, 2015 Final Amended Judgments. (R., p. 6406.)

On October 30, 2015, the forty-two (42) day deadline for filing a Notice of Appeal expired (assuming that the September 18, 2015 Eberle Berlin Judgment made all Judgments final).

### **III. SUPPLEMENTAL ISSUES ON APPEAL**

1. Whether timeliness of a Motion for Reconsideration is jurisdictional.
2. Whether timeliness of a Motion for Reconsideration can be raised *sua sponte* for the first time on appeal.
3. The effect on the appeal if the Motion for Reconsideration was untimely.

#### IV. ARGUMENT

A. **Timeliness of the Motion for Reconsideration is Jurisdictional.**

“A motion for reconsideration which does not assert some grounds for relief recognized under another existing rule, or which is not filed within the time required by such rule, does not properly invoke the jurisdiction of the trial courts, nor does it toll the running of the appeal time on any order or judgment sought to be reviewed by such a motion for reconsideration.” *First Bank & Trust of Idaho v. Parker Brothers, Inc.*, 112 Idaho 30, 32, 730 P.2d 950, 952 (1986).

“Since the motion was not filed within 10 days of entry of judgment, the Court had no power to grant the relief request . . . . The motion was properly denied.” *Wheeler v. MacIntyre*, 100 Idaho 286, 289, 596 P.2d 798, 801 (1979). The issue of the timeliness of Taylor’s Motion for Reconsideration is jurisdictional.

B. **Timeliness of the Motion for Reconsideration Can Be Raised Sua Sponte.**

The issue of a Court’s lack of jurisdiction can be raised *sua sponte* by a trial or appellate court. *State v. Armstrong*, 146 Idaho 372, 374, 195 P.3d 731, 733 (Ct. App. 2008). Parties cannot consent to the Court’s assumption of jurisdiction through conduct or acquiescence nor be estopped from asserting its absence. *Fairway Development Co. v. Bannock County*, 119 Idaho 121, 125-126, 804 P.2d 294, 298-299 (1990). A Court’s lack of subject matter jurisdiction cannot be waived by a party. *State v. Armstrong*, 146 Idaho at 374, 195 P.3d at 733. Accordingly, a party may assert a lack of subject matter jurisdiction for the first time on appeal. *Idaho State Ins. Fund v. Turner*, 130 Idaho 190, 191, 938 P.2d 1228, 1229 (1997).



The issue of whether Taylor's Motion for Reconsideration was timely filed was appropriately raised for the first time on appeal, *sua sponte* by this Court. The issue was not waived by any actions taken or not taken by the parties or the District Court.

**C. Effect on Appeal.**

If the September 18, 2015 Eberle Berlin Judgment made all Judgments final, then the Motion for Reconsideration was untimely filed. The District Court had no jurisdiction to grant the relief requested in an untimely filed motion for reconsideration. *Wheeler*, 100 Idaho at 289, 596 P.2d at 801. It follows that if the District Court did not have jurisdiction to grant the Motion, it did not have jurisdiction to consider the Motion, the supporting Memorandum or supporting Declarations, including the Expert Witness Declaration of Richard T. McDermott. Documents, filings, evidence or other information not properly considered by the District Court are not a proper part of the Appellate Record. *King v. Seebeck*, 20 Idaho 223, 229, 118 P. 292, 293-294 (1911); *Baldwin v. Singer Sewing Machine Co.*, 48 Idaho 596, 598, 284 P. 1027, 1028 (1930). Matters not properly considered by the District Court should not be considered by this Court in determining the substantive issues on appeal. The effect, if the Motion for Reconsideration is untimely, is that the Motion, supporting Memorandum and supporting Declarations should be excluded from consideration or deleted from the Appellate Record and should form no basis for determining the substantive issues on appeal.

If, on the other hand, the October 9, 2015 Final Amended Judgments in favor of Riley and Hawley Troxell are the final judgments, there is no effect on the appeal. Plaintiff's Motion for Reconsideration was timely filed in relation to those Judgments. The Appellate Record and

the matters that can be considered in determining the substantive issues on appeal would remain status quo.

## V. CONCLUSION

The issue presented at oral argument is what effect the timeliness of the Motion for Reconsideration has upon the pending appeal. If the Motion was untimely, the Motion, supporting Memorandum and Declarations should not be considered in determining whether to affirm the dismissal of all claims against Riley and Hawley Troxell. If the Motion was timely, there is no effect upon the pending appeal.

DATED this 28 day of August, 2017.

ELAM & BURKE, P.A.

By: 

Jeffrey A. Thomson, Of the firm  
Attorneys for Defendants/Respondents  
Richard A. Riley and Hawley Troxell Ennis  
& Hawley LLP

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28 day of August, 2017, I caused a true and correct copy of the foregoing document to be served as follows:

Roderick C. Bond  
Roderick Bond Law Office, PLLC  
601 108th Avenue NE, Suite 1900  
Bellevue, WA 98004

☒ U.S. Mail  
☐ Hand Delivery  
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\_\_\_\_\_  
Jeffrey A. Thomson

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